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ABSTRACT

This speech outlines factors that preclude the reform of teacher tenure laws, describes improvement for these laws, and sets forth conditions under which they should be abolished. Some of the suggested improvements include (1) provisions for genuine probationary periods for teachers, (2) implementation of adequate teacher evaluation programs, (3) stipulation of grounds for dismissal as anything that adversely affects a teacher's classroom teaching performance, (4) authorization of intermediate sanctions in "teacher tenure" laws, (5) creation of parity between a dismissal action and an action to revoke a teacher's credential or certificate, and (6) provision for clear and expeditious resolutions of suspension and dismissal cases. A related document is EA 003 965. (JF)

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"SHOULD TEACHER TENURE LAWS BE REPEALED?"

by

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This morning's topic is a "symposium" on "teacher tenure." The conference chairman has assigned me to argue the "pro," and Mr. Ellman to argue the "con" of the issue:

Should Teacher Tenure Laws be Repealed?

At the outset, three matters should be made crystal clear. The first is that the quasi-debate format was conceived by the conference chairman as simply a vehicle which hopefully would augur for a more clear and sparkling presentation of the issues. Thus, as the conference programs says, the views expressed in the course of our advocacy are not necessarily our personal viewpoints or those of our clients. The other two matters that should be remarked upon at the beginning are definitional in nature.

First, let us look at the definition of the word "symposium." According to my Funk and Wagnall, "symposium" means:

> . . . A drinking together; a convivial feast or banquet. Among the ancient Greeks the symposium followed the dinner, and was characterized by the drinking of wine mixed with water, by intellectual or entertaining conversation, and by music, dancing, and other amusements.

While I haven't discussed this with Mr. Ellman, it is my hope that I will take care of the conversation and he will do all the singing, dancing and making of other amusements. . . .

With the weighty concept of a "symposium" firmly fixed in our mind, let us turn to the definition of "teacher tenure." There is a real difference between the "popular" concept and the "legal" concept of "teacher tenure."

As a strictly legal concept, teacher tenure is composed of two separate components. Stated in a simple mathematical equation:

Teacher Tenure =	Specific, known reasons which are the exclusive grounds on which a teacher's employment may be terminated.	+	Specific, known procedure for holding a fair hearing to determine whether there are valid reasons to terminate a teacher's employment.

In other words,

T =	grounds for dismissal	+	hearing procedure to ascertain whether such grounds actually exist.

Teacher tenure is <u>not</u> a "job guarantee" (as it is often misconceived to be by the public), but rather a job security device protecting against termination of employment in cases where there are no grounds for termination or where the teacher has no fair opportunity to present his defense. However, the extent to which state law makes the grounds for dismissal virtually impossible to prove or the procedure to determine whether such grounds exist too cumbersome, time consuming and expensive, the concept of tenure as deserved "job security" protection transforms itself into an undeserved "job guarantee". And, "Aye, there's the rub!"

There is really no problem with "teacher tenure" as a <u>strictly legal concept</u>. Some form of job security for governmental employees who have established a reputation for competency and industriousness can hardly be labeled a startling idea in America since the inauguration of the civil service system during the early days of our Republic. Problems can arise, however, in the manner in which the concept is actually implemented under State law as a practical part

of employer-employee relations in public school districts today.

Historically, "teacher tenure" gave the individual teacher some measure of security against arbitrary and capricious dismissal from school authorities. It predated by hundreds of years the concept of formal "collective negotiations," which is such a dynamic part of public school operations today. In fact, it is fair to say that the rise of "collective negotiations" in public education since World War II is a primary factor which has caused many citizens (correctly or incorrectly, well-intentioned or vindictively, reasonably or unreasonably), to take a hard, long, second-look at the practical impact of "teacher tenure" on the governance of the public schools, colleges, and universities throughout our nation today. But, there is a wide chasm separating such a "second-look" at "teacher tenure" and the repeal of legislation controlling "teacher tenure" in any state. The realities which anyone must face who is contemplating even the suggestion of minor changes to "teacher tenure" laws, much less outright repeal, are considerable. They include:

1. The sheer political power of the organized teacher profession. Teacher organizations are well-financed; they are governed and staffed by highly intelligent, sophisticated, and dedicated persons who have a firm grasp upon what constitutes the best interests of the profession they represent. They recognize the value of maintaining an effective lobbying effort in the State Legislatures and in Congress. This, in tandem with the fact that teachers are dispersed throughout the legislative and congressional districts of states and are capable of bringing immense pressures on lawmakers in their home precincts, results in considerable influence on legislators. In short, anyone proposing a new "teacher tenure" law has a heavy burden carrying it past the opposition of the organized teaching profession.

2. The tendency of the Courts to expand constitutional due process in teacher dismissal cases. Due process is both a hearing procedure and a guarantee that action adverse to substantial interests of a person will not be taken for frivolous or inadequate reasons. In states having no "teacher tenure" statutes, constitutional due process, depending upon the status of the law in the state, provides a judicially-made "quasi-tenure" protection. Due process is a continuum, ranging from one end, which contemplates all the protections as to right to advance notice, cross-examination, counsel, privilege against self-incrimination, and all the other incidents of a criminal trial under our American judicial system, to the opposite end, which simply entails asking the accused orally without prior notice for "his side of the story," as in school law cases involving short term suspensions of students from school. This entire area of the law is in a state of change, with the trend seeming to head toward the more stringent end of the continuum, thus requiring more and more formalism in more and more circumstances. From the teachers' viewpoint, the trouble with relying on constitutional due process to provide tenure protection is that due process is strong on procedure but weak on grounds. That is, except in blatant cases, a court generally will not substitute its judgment for that of the school board as to the adequacy of the reasons buttressing a dismissal action. Rather, a court will direct its energies to ensuring that the reasons the school board gave for its action really existed and that the accused teacher had a reasonable chance to rebut them. Whatever its infirmities, however, the courts seem embarked upon a course of developing a "common law tenure" in those states where the Legislatures have not enacted a statutory plan of tenure.

3. <u>The genuine concern of many people about the power of the State, acting through public school authorities, to require a static and debilitating conformity in times of societal change and stress</u>. Not only is the public school system a form of State government (and Americans have characteristically mistrusted government and all the political leaders heading it up), but it also deals mainly with the minds of the young. Many persons who believe that political leaders, including school board members, are more concerned with today's rainstorm than they are about tomorrow's flood, are afraid that unbridled authority in the dismissal of teachers will lead to an utterly mediocre teaching profession which is ill-equipped to educate today's youngsters who will spend more of their lives in the 21st century than the 20th century!

4. <u>The "Hog Hollow Syndrome."</u> Whenever a change is proposed in "teacher tenure" legislation, advocates of the <u>status quo</u> can always cite an example of outrageous conduct by a school board or a school administrator somewhere, someplace, and sometime ago which the provision under consideration protects against. The argument usually starts out something like this: "You ought to be ashamed of yourself for wanting to change that law. Don't you know what happened to Rufus Smith, a teacher in Hog Hollow in 1921?? . . . " The logic is closely akin to that which would force us to deny automobile driver's licenses to red-headed men because one had an accident upstate several years ago, or to prohibit all sales of aspirin because a tragic accident occurred resulting in the death of a child. This is not to say that Rufus was treated fairly; most likely, he was not. But to predicate a whole scheme of employment on the folly of just a few individuals,

I submit, does not necessarily serve the public good.

Presuming then, that one can face up to these realities in considering changes to "teacher tenure" laws, what are the areas of "teacher tenure" laws that people want to reexamine? Stated another way, what are the criticisms of "teacher tenure" laws as such laws are implemented in practical terms today? There are at least eight areas in which many people see a need for review:

1. <u>There should be a genuine probationary period for teachers</u>. School boards should be given wide latitude in releasing teachers who cannot measure up to standards laid down by the district during a probationary period, which must be sufficiently long to permit adequate evalution. "Instant tenure," which is a term used to describe the requirement of a hearing for the termination of probationary employees, makes a probationary period illusory, as a practical matter.

2. <u>The education profession and school authorities must implement an adequate teacher evaluation program</u>. Teachers tell us that "evaluation is the key to tenure." And this is the decade of accountability! Teacher tenure laws should make provision for the development of effective evaluation guidelines and require that evaluations be made on a regular and continuing basis.

3. <u>Anything should be a ground for dismissal which adversely affects a teacher's teaching performance in the classroom</u>. Instead of a laundry list of reasons for which a teacher may be terminated, any reason which seriously diminishes his capacity to serve the children should be adequate grounds for dismissal. Many persons who view public education as one of the true foundations of national power also would include, as a separate second ground for teacher dismissal:

a pattern of performance which indicates a failure or refusal to support the public policy of the State as specifically set forth by the State Legislature in consonance with the State and Federal Constitutions.

4. The disparity between job security protection of teachers and similar protection for other classes of governmental employees should be reviewed. Generally, "teacher tenure" provides more job security than most other forms of governmental employment. Why, for example, should a teacher be entitled to more job security than an architect, attorney, social worker or engineer employed by a county?

5. Court review of teacher dismissal actions should be limited to the questions of (a) whether the school board substantially complied with the procedures relating to notice and granting a hearing in the case, and (b) whether there was substantial evidence to support the school board's dismissal action. Even a limited trial de novo which contemplates that the Court use its "independent judgment" in reviewing a teacher dismissal case places the court in the position of the employer. And the courts simply do not have any business in our scheme of government to perform this duty. The problem stems from confusing the role of the school board, on the one hand, as a governmental entity, and on the other hand, as an employer. The functions of the courts always have included "watchdogging" governmental agencies and remedying arbitrary, capricious, and illegal actions by such agencies. The issue is: should the courts also "watchdog" the school board when it is acting as an employer to the extent that the court actually usurps the most crucial role of the employer--the right to decide who should be dismissed.

6. Intermediate sanctions should be authorized in "teacher tenure" laws. Termination of employment is the ultimate sanction exercised by an employer against an errant or failing employee. Under the usual "teacher tenure" statute, outright dismissal is the only real sanction which may be imposed upon a teacher whose performance is marginal or less than satisfactory. There should be authority in "teacher tenure" laws to permit intermediate sanction short of outright dismissal, such as forfeiture of tenure rights, reversion to probationary status, loss of a future salary increase, or other intermediate action taken as a reasonable alternative to outright dismissal under all the facts of an individual case.

7. There should be a parity between a dismissal action and an action to revoke a teacher's credential or certificate. "Teacher tenure" laws should contain the requirement that, in appropriate cases, a dismissal from employment also should result in a revocation of the dismissed teacher's license to teach. Usually, it takes two hearings to accomplish this. By combining, in appropriate cases, both hearings in a fair and reasonable manner, the law would eliminate, from the teacher's viewpoint, a "double-jeopardy" situation, and from the viewpoint of the school district, the necessity of "proving the case twice."

8. "Teacher tenure" laws should provide for clear and expeditious resolution of suspension and dismissal cases. Suspension or dismissal hearings should be conducted as promptly as possible following initiation of a suspension or dismissal action. Any court appeals should be entitled to precedence on the trial calendar. The purpose of a speedy resolution of a teacher suspension or dismissal case is to benefit the teacher, who is in an "employment limbo" during the pendency of the action, and to benefit the schools, which often are

in an agitated state while a teacher is "on trial" for his job and to lessen the public's liability to pay back salary to a teacher who it ultimately turns out was improperly suspended or fired.

Finally, two other misconceptions about "teacher tenure" should be clarified:

1. Collective Bargaining job security provisions as a substitute for "teacher tenure" laws. This is "teacher tenure" wrapped up in a different package. Instead of a public law enforceable by the teacher independent of contract, which "teacher tenure" is in the public schools, the Collective Bargaining agreement would provide a private contractual agreement as fully enforceable at law as any "teacher tenure" statute. The problem with "teacher tenure" provisions being incorporated in Collective Bargaining contracts is that it takes away from the State Legislature the authority to control, on a uniform, statewide basis, this important aspect of school district governance.

2. The long-term individual employment contract as a substitute for "teacher tenure." This proposal embodies a contract with individual teachers for terms of several years. At the conclusion of the contract term, the teacher could be released without the necessity of the school board having to show cause. This proposal is largely illusory as a substitute for "teacher tenure" because it provides the same protection during the term of the contract and today's employee organizational realities in public school districts simply won't stand for the casual dismissal of teachers at the end of the contract term.

That is the case for the repeal and amendment of "teacher tenure" laws. In California this year, our "teacher tenure" laws were dramatically overhauled. The overhaul was participated in by teacher,

administrator and school board groups and was characterized by considerable compromise on all sides. In today's active, participatory democracy, that is the only way a good law can be enacted.

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